

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 MOBILEMEDIA IDEAS LLC, : CIVIL ACTION

5 :

6 Plaintiff, :

7 :

8 vs. :

9 :

10 APPLE INC., :

11 :

12 Defendant. : NO. 10-00258-SLR-MPT

13 - - -

14 Wilmington, Delaware

15 Monday, July 30, 2012

16 10:00 o'clock, a.m.

17 \*\*\*Telephone conference

18 - - -

19 BEFORE: HONORABLE MARY PAT THYNGE, U.S. MAGISTRATE JUDGE

20 - - -

21 APPEARANCES:

22 MORRIS, NICHOLS, ARSHT & TUNNELL

23 BY: RODGER D. SMITH, II, ESQ. and

24 JACK B. BLUMENFELD, ESQ.

25 -and-

26 Valerie J. Gunning  
27 Official Court Reporter

1 APPEARANCES (Continued) :

2 PROSKAUER ROSE LLP  
3 BY: JUSTIN J. DANIELS, ESQ.  
4 (Boston, Massachusetts)

5 Counsel for Plaintiff

6

7 MORRIS JAMES LLP  
8 BY: RICHARD K. HERRMANN, ESQ. and  
9 MARY B. MATTERER, ESQ.

10 -and-

11 O'MELVENY & MYERS LLP  
12 BY: LUANN L. SIMMONS, ESQ.  
13 (San Francisco, California)

14 Counsel for Defendant

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1 P R O C E E D I N G S  
23 (REPORTER'S NOTE: The following telephone  
4 conference was held in chambers, beginning at 10:00 a.m.)  
56 THE COURT: Good morning, counsel. This is  
7 Judge Thyng for the issue, discovery issue that has been  
8 raised by Apple against MobileMedia.9 Before we begin, I'm going to get introductions  
10 from counsel as to who is on the line, and I will also  
11 remind you that Val Gunning is the Court Reporter who is  
12 taking down this proceeding.

13 So who is on the line on behalf of MMI?

14 MR. SMITH: Good morning, your Honor. Rodger  
15 Smith at Morris Nichols along with my partner, Jack  
16 Blumenfeld, and also Justin Daniels from Proskauer.

17 MR. DANIELS: Good morning, your Honor.

18 THE COURT: Good morning to all of you.

19 And who is on the line on behalf of Apple?

20 MR. HERRMANN: Good morning, your Honor. It's  
21 Richard Herrmann, and I have my partner Mary Matterer with  
22 me as well as Luann Simmons from O'Melveny & Myers.

23 THE COURT: Good morning to all of you.

24 Understanding that this is Apple's motion, I  
25 will have Apple speak first. And I'm assuming, Luann,

1 you'll be talking on behalf of Apple?

2 MS. SIMMONS: Yes, your Honor. Thank you.

3 THE COURT: Why don't you begin.

4 MS. SIMMONS: Thank you, your Honor.

5 I would like to start by just noting, as we set  
6 forth in our letter, that the sensitivity of Apple's source  
7 code simply cannot be overstated. I won't beat the dead  
8 horse on that, but it truly is the most sensitive thing that  
9 Apple has, and because of that, we go to great lengths to  
10 limit the number of printed copies or electronic copies that  
11 can be made in order to try to limit the risk of  
12 unauthorized disclosure. And that is what we tried to do  
13 with the provisions of this protective order. We tried to  
14 limit the circumstances under which copies could be made and  
15 under which access to the code could be obtained.

16 THE COURT: It might be helpful, though, Luann,  
17 because I recognize that you've made your arguments to me  
18 concerning Dr. Williams' reported violations as well as Dr.  
19 Meldal's --

20 MS. SIMMONS: Yes, your Honor.

21 THE COURT: -- also purported violation, which  
22 is significantly different, I think, than Dr. Williams, but  
23 there were certain issues that were raised by MobileMedia as  
24 to why -- their interpretation, I think it goes to the  
25 source code, as to why they don't feel that there has been

1 unauthorized disclosure or violation of the protective  
2 order. So I think addressing those issues and seeing how  
3 the two mesh.

4 I will fully recognize that the source code by  
5 any company, and Apple is no different in this regard, is  
6 extremely sensitive and extremely important and steps are  
7 taken to protect it, and the Court recognizes that those  
8 steps were attempted to be incorporated in the protective  
9 order.

10 So the issue, there seems to be some rub here,  
11 and I think part of the interpretation that I've taken from  
12 what was submitted by MobileMedia is one Apple -- some  
13 comments about permitting MobileMedia and its experts to  
14 have access to the source code for over -- more than 60  
15 occasions. But the concept of how much is allowed to be  
16 printed, no more than 50 continuous pages, and how the  
17 source code reads, and the allowance of Dr. Williams to  
18 use Mr. Finch to review certain portions of the source  
19 code for him and then print them off. That seems to be  
20 the main rub.

21 MS. SIMMONS: Agreed, your Honor. It appears  
22 from MobileMedia's submission and from the parties' meet and  
23 confer that MobileMedia is interpreting now this provision  
24 to mean that as long as someone associated with MMI goes to  
25 the source code machines or discs -- fact discovery is

1       closed now, but went to the source code machines and printed  
2       the code out, reviewed it in order, you know, quote unquote  
3       reviewed it in order to be able to print it, that that  
4       satisfied this provision.

5               But that is clearly not what was intended by  
6       this provision. This provision was not set up so that just  
7       any person associated with MMI could come and do some  
8       extraordinarily high level review based on some general  
9       descriptions of what to look for and then print out  
10       thousands and thousands of pages of source code to be sent  
11       back for the actual review to occur by the expert in paper  
12       form.

13               That, in our view, does not meet the requirement  
14       that only limited portions of the source code be printed  
15       only when reasonably necessary to prepare the reports.  
16               That, in our view, is certainly contrary to the letter and  
17       spirit of that provision of the protective order. So we  
18       think that that reads that provision essentially out of the  
19       protective order, to just allow anyone to come and print it  
20       for review elsewhere in the first instance.

21               THE COURT: Was Mr. Finch under the protective  
22       order? Did he sign off or do what he needed to do, Patrick  
23       Finch?

24               MS. SIMMONS: He was under the protective order,  
25       your Honor.

1 THE COURT: Okay.

2 MS. SIMMONS: He was not disclosed as the  
3 someone that Dr. Williams relied on. So Dr. Williams in his  
4 expert report did not say anything at all about Mr. Finch,  
5 much less that he relied on him. And during his deposition,  
6 Dr. Williams similarly said that he did not rely on  
7 Mr. Finch.

13 MS. SIMMONS: Well, it's actually a little bit  
14 unclear. I think what seems to have happened, although  
15 it seems that MMI is kind of walking both sides of this  
16 line.

17 It seems that Dr. Williams gave very high level  
18 descriptions of the kinds of code he was looking, for and we  
19 asked for some of those descriptions and they were quite  
20 high level. He gave those descriptions to Mr. Finch and  
21 asked Mr. Finch to simply do some searching around to find  
22 code that met that criteria, print it all out and send it  
23 back to New York for Dr. Williams to review. And if that is  
24 what happens, we believe that's a violation of the  
25 protective order and perhaps does not qualify as Dr.

1 Williams having relied on in some substantive way in  
2 Mr. Finch.

12 MS. SIMMONS: Correct. And as to the issue of  
13 continuing to provide access to the code, that was  
14 specifically in reliance on MMI's former counsel's  
15 representations that this was not happening.

16 THE COURT: When did present counsel enter the  
17 picture, roughly?

18 MS. SIMMONS: I believe the folks from Proskauer  
19 were involved from the beginning but didn't take over as  
20 lead counsel until earlier this year.

21 || Justin, is that right?

22 MR. DANIELS: That's right, your Honor. We took  
23 over in litigation in the beginning of March of this year,  
24 your Honor.

25 MS. SIMMONS: The e-mail that we received

1 ensuring us or telling us that this was not happening, that  
2 source code was not being printed for review elsewhere in  
3 printed form in the first instance came -- not from  
4 Proskauer. It came from Sullivan.

5 MR. SMITH: Your Honor, this is Rodger Smith.

6 If I might just add to Justin's comments,  
7 Proskauer was working in the background and Alan Federbush  
8 who appears on the log is also copied on that same e-mail  
9 from Sullivan and begins by saying, I've spoken with Alan,  
10 or something to that effect.

11 So Proskauer was involved and was consulting  
12 with Sullivan and Cromwell at the time, just for clarity.

13 THE COURT: It starts off, Luann, I have  
14 communicated -- and this is an e-mail that was sent on  
15 December 1st, 2007. Luann, I've communicated about this  
16 with Alan who has spoken with MMI's experts. Our experts  
17 have informed us that they requested printing of the source  
18 code because it was reasonably necessary to prepare an  
19 expert report as set forth in Section 11C iv of the  
20 protective order. Okay.

21 MS. SIMMONS: And, your Honor, our concern here,  
22 I believe there was one other point that you wanted me to  
23 respond to about the issue of whether there has or has not  
24 been any disclosures outside of those under the protective  
25 order. We are not aware -- MMI is correct, we are not aware

1 of any disclosures that have occurred yet, but I guess the  
2 provision in the protective order is not conditioned on  
3 there actually having been a disclosure, and it seems,  
4 again, contrary to the spirit of this provision to have to  
5 wait until a disclosure occurs. And we've got 7,000 pages,  
6 give or take, of source code now floating about and the  
7 vast majority of those were not even used in the expert  
8 reports.

9 THE COURT: I guess what you are saying is,  
10 no harm, no foul doesn't operate. The whole purpose  
11 of the protective order was to prevent that harm from  
12 occurring?

13 MS. SIMMONS: That's correct, your Honor.

14 THE COURT: All right. Regarding Dr. Meldal,  
15 the concern with him is that he printed photocopies of  
16 Apple's source code, but then testified that the routine was  
17 that he made and kept those printed for safekeeping and then  
18 sent the original printed copies of the code by Fed-Ex to  
19 MMI's counsel in New York.

20 All right. The concern that you had there was  
21 what?

22 MS. SIMMONS: Just additional copies of the code  
23 that were made for purposes other than being reasonably  
24 necessary to the preparation of the reports. And in all  
25 candor, your Honor, had this been the only issue, I think, I

1 have to imagine we could have dealt with this without having  
2 to burden the Court. It's just that this and the failure to  
3 sign the source code log and then the printing of  
4 7,000 pages, a lot of which were reviewed in the first  
5 instance in print form, it's the combination that starts to  
6 make people at Apple start to get very antsy about the  
7 protection of their source code.

8 THE COURT: Let's separate out Dr. Meldal's  
9 violation, purported violation, and your comment that you  
10 just made, Luann. If this had been the only violation, what  
11 would Apple, or what would you have been requesting or  
12 looking for from MMI?

13 MS. SIMMONS: Had this been the only violation,  
14 no other violations at all of the protective order had  
15 occurred and this was the only one, we would have simply  
16 asked, I think, for the safe copies back from Dr. Meldal.  
17 He would have asked that they be returned.

18 THE COURT: Now, the read that I got, and maybe  
19 I'm wrong on this, is that he does not have any copies, that  
20 he made -- that he forwarded those printed copies to MMI's  
21 counsel in New York.

22 Is that how you are reading it, that he does not  
23 have anything now, that it's now all in the hands of MMI's  
24 counsel?

25 MS. SIMMONS: No. He testified that he kept his

1 safe copy, and at least as of the time that his deposition  
2 was taken in April, he still had that safe copy.

3 THE COURT: And did he explain why to you that  
4 he kept the, quote, safe copy?

5 MS. SIMMONS: He just said that was the routine.

6 THE COURT: How many pages of source code does  
7 he have? Do you know?

8 MS. SIMMONS: I do not. I know that the experts  
9 combined printed over 7,000 pages and in their combined  
10 expert reports cited to only 888 of those pages.

11 THE COURT: And Dr. Meldal is an expert for the  
12 plaintiff in -- for what? For what issues?

13 MS. SIMMONS: He is addressing, I believe it's  
14 five patents. I'm trying to remember if it was five or six  
15 patents, I think a couple of which at least have been  
16 deferred at this point. So they split up their three  
17 experts amongst the patents, so he addressed both  
18 infringement and validity issues for the patents that he was  
19 assigned to cover.

20 THE COURT: In light of the separating -- all  
21 right. And I may have misunderstood what you were trying to  
22 express, Luann. You said that certain patents had been  
23 deferred in this case?

24 MS. SIMMONS: That's correct. The parties  
25 agreed, and when we had a scheduling or status conference

1 before Judge Robinson, I believe in April it was now, we  
2 presented this to the Court and the Court accepted it, that  
3 we would go forward for this phase of the litigation with  
4 ten patents and that four of the remaining 14 patents would  
5 be -- deferred may not be the right word -- temporarily  
6 stayed for the next phase might be a better way to express  
7 it.

8 MR. DANIELS: Actually, they were bifurcated  
9 out.

10 MS. SIMMONS: Right. Right. Thank you, Justin.  
11 THE COURT: All right. And do we know now, and  
12 this is maybe a question for Justin -- you don't have to go  
13 through a long explanation, Justin -- whether Dr. Meldal is  
14 going to be testifying in the first trial in light of this  
15 bifurcation process?

16 MR. DANIELS: Yes, your Honor. Dr. Meldal will  
17 be testifying both on infringement issues -- well, on the  
18 source code, yes. On infringement issues as well as  
19 validity, but he will be testifying in the current trial  
20 with I respect I believe five of the ten patents, as Luann  
21 has stated.

22 THE COURT: All right. That's all I wanted to  
23 know. I just wanted to confirm whether he was going to be  
24 here at trial or not.

25 Okay. And concerning Dr. Williams, Luann, I'm

1       trying to figure out what you meant by your second bullet  
2       point for requested relief. At Page 3 of your submission,  
3       where it says, Dr. Williams be precluded from relying on or  
4       testifying about any information he obtained from Mr. Finch,  
5       including any information about Apple's source code or the  
6       operation of the accused products.

7                   MS. SIMMONS: It's still a little unclear how  
8       much information was exchanged between Dr. Williams and  
9       Mr. Finch, but to the extent Dr. Williams gained information  
10       or knowledge are about how Apple's source code is set up or  
11       works or is organized, if he only gained that information  
12       through Mr. Finch and did not get that information from  
13       reviewing the source code on the actual source code  
14       machines, that's the kind of information we're trying to  
15       get at from bullet point 2. We think it would be improper  
16       for him to be permitted to testify as to that information  
17       when he obtained it, we believe, in violation of the  
18       protective order and then also didn't disclose that he was  
19       relying on Mr. Finch and his expert report.

20                  THE COURT: All right. Let me go back a little  
21       bit since I want to understand more specifically.

22                  What you actually, and you said it in general, I  
23       didn't get it down, as to what you would be looking for.  
24       Are you basically trying to eliminate Dr. Williams as an  
25       expert, then?

1                   MS. SIMMONS: No, absolutely not. We think that  
2 would be far too extreme --

3                   THE COURT: All right.

4                   MS. SIMMONS: -- under these circumstances.

5                   THE COURT: Specifically --

6                   MS. SIMMONS: But we do think it would be  
7 inappropriate for him to be permitted to rely on information  
8 about the source code he obtained solely from Mr. Finch.

9                   MR. DANIELS: Although that would be the effect,  
10 your Honor.

11                  THE COURT: Justin, you'll have a chance.

12                  MR. DANIELS: Okay.

13                  THE COURT: Rely upon information about the  
14 source code he received?

15                  MS. SIMMONS: From Mr. Finch.

16                  THE COURT: From Finch. Now, what the heck does  
17 that mean?

18                  MS. SIMMONS: Yes. I can appreciate Justin's  
19 comment because the way I said that probably was not as  
20 clear as I should have been.

21                  We actually are not even seeking at this point,  
22 although I think under the protective order we would be  
23 entitled to, but we are not seeking to preclude Dr. Williams  
24 from testifying about the actual source code he reviewed  
25 even though he reviewed it in present form in the first

1 instance in violation of the protective order.

2 So to be clear, that's not what we're seeking.

3 We are just seeking that to the extent he has additional  
4 knowledge about, for instance, I reviewed this particular  
5 file of the source code and I know that that fits into the  
6 overall structure of Apple's source code in the following  
7 way, it's that latter part of his explanation with  
8 information he obtained from Mr. Finch and did not obtain  
9 from having reviewed that information on the source code  
10 machines himself, that's the information we're getting at  
11 from the second bullet point.

12 THE COURT: All right. But if he had not  
13 reviewed the source code on the source code machines  
14 himself, but then subsequently reviewed the source code  
15 based upon his instructions to Mr. Finch to run off portions  
16 of the source code, or told him, here's what I'm looking for  
17 even at a high level, are you saying that he should not --  
18 but he reviewed it afterwards, he reviewed the printed  
19 copies, are you saying he should not be allowed to testify  
20 about the stuff that he actually reviewed?

21 What I'm trying to understand is, are you saying  
22 that he had to review it off the source code himself, and if  
23 he didn't do it and didn't review it off the source code  
24 machine himself, then he's not entitled to -- but he  
25 reviewed it based upon a printed copy of the source code,

1 that he's not allowed to rely upon what he gleaned from that  
2 printed copy?

3 MS. SIMMONS: We are not asking for that. I  
4 think we should be allowed to ask for that under the  
5 protective order, but that is, in fact, not what we were  
6 asking for in light of our efforts to reach a middle ground  
7 on this and not have requested such an extreme sanction.  
8 That is, in fact, not what we are asking for.

9 We are just asking that to the extent there is  
10 any additional knowledge about the overall structure of  
11 Apple's code or how it is organized that Dr. Williams  
12 obtained from Mr. Finch absent any review of either printed  
13 or electronic source code on his own, that's really all  
14 we're getting at.

15 THE COURT: All right. And part of that is  
16 because he never identified Finch as a source of  
17 information.

18 MS. SIMMONS: That's correct.

19 THE COURT: All right. That's what I'm trying  
20 to understand. Thank you.

21 MS. SIMMONS: That's right. Sorry. I know that  
22 was a little convoluted.

23 THE COURT: It was, but I wanted to parse it out  
24 because, depending upon what I decide to do, I do not -- I'm  
25 trying to understand what Apple is requesting, at least at

1 this time. Okay.

2 MS. SIMMONS: Thank you, your Honor.

3 THE COURT: Thank you.

4 All right. I'm assuming we're going to hear  
5 from Justin?

6 MR. SMITH: It's Rodger. If I might, I think I  
7 can address most of the issues, and there may be a few that  
8 I need to defer to Justin on, but if you don't mind, I will  
9 proceed.

10 THE COURT: I wasn't trying to select. I just  
11 work from a mistaken assumption, Rodger. I'm always willing  
12 to listen to what you have to say.

13 MR. SMITH: Thank you, you Honor.

14 I think your comment about no harm, no foul is  
15 apt here because there was no harm and there was no foul.  
16 There was no one that provided disclosures that we talked  
17 about, and I think as Ms. Simmons recognized. There's no  
18 specific harm identified in the letter or on the call today  
19 to Apple.

20 THE COURT: But I don't think there has to be a  
21 harm identified, Rodger.

22 MR. SMITH: Let me get to the no foul part,  
23 then.

24 THE COURT: Okay.

25 MR. SMITH: The protective order, and you've

1       probably seen this provision in other cases, adds the  
2       language about reasonably necessary, and I've had, over the  
3       last couple months had this issue come up in a case with  
4       Judge Andrews, and there's some ambiguity there, right, and  
5       you have to sort of wonder what that means. And Apple might  
6       have one view you and MobileMedia has a different view.

7               But here you have guideposts. Through our  
8       infinite wisdom at the time, we put in a guidepost. I don't  
9       remember the negotiations. I don't think we were even  
10      involved when it was negotiated, but there is a guideposts,  
11      and it says we can't print more than ten percent of any  
12      software release or whatever the language is --

13               THE COURT: Specific.

14               MR. SMITH: -- and no more than 50 continuous  
15      pages.

16               There has been no complaint that we violated  
17      either of those provisions, and so I think, your Honor,  
18      the protective order itself tells you what is presumptively  
19      a reasonable amount of code an expert in this case would  
20      need.

21               And it is --

22               THE COURT: But, Rodger, let me back up because  
23      I've got some questions to understand how this language may  
24      print up to ten percent of a specific software release so  
25      long as it does not print out more than 50 continuous pages.

1 I have no idea what that means or what it could mean, but  
2 obviously, counsel and the parties had some understanding as  
3 to what that could mean, and I would like to understand  
4 MMI's interpretation of that.

5 And when we are talking about ten percent of a  
6 specific software release, you know, I sit there, and  
7 software during a trial gets plugged in and it's put up on a  
8 screen and it's a bunch of letters that I don't quite  
9 understand and somebody has to interpret it for me. But I  
10 have no idea what amount of software we're talking about  
11 when it's limited to ten percent of a specific software  
12 release.

13 MR. SMITH: I will let Justin jump in, but the  
14 fact is -- the fact is, there's no complaint we've exceeded  
15 ten percent, so I think we can assume it's somewhere over  
16 70,000 pages, or whatever the number is they said we printed  
17 times ten. So, you know, we're well within that. And, you  
18 know, keeping it in context, this is a case that's now down  
19 to, I guess, to about ten patents, but there was  
20 significantly more early on in the case. And as you know,  
21 because you've dealt with this case before on discovery  
22 matters, there are various aspects of the IOS system that  
23 are at issue.

24 THE COURT: Yes.

25 MR. SMITH: I think the parties recognize that

1       there might be some issues about the scope of what would  
2       need to be produced, what MobileMedia would feel would need  
3       to be produced, and that Apple might have some objections.  
4       So they put down a guidepost for your Honor to look to, is  
5       this particular interval when a complaint was made as to how  
6       much was printed.

7                   And not having violated that and not having any  
8       suggestion that what we did was not reasonably necessary  
9       leaves us wondering what we did wrong, what we should have  
10       done different other than to ask Apple what they believe is  
11       reasonable because we had already agreed between the parties  
12       what's reasonable.

13                   I will let Justin answer your specific question,  
14       if he can.

15                   MR. DANIELS: Yes. I think if I can is the best  
16       I can do.

17                   You know, certainly, Apple's source code is  
18       millions of lines, so I think that ten percent is not, you  
19       know, an unreasonable percentage, but I agree that it's a  
20       little bit hard to measure. 7,000 I think in the scheme of  
21       Apple's entire source code, even in a version, is pretty  
22       small, relatively speaking.

23                   And so we're talking millions and millions of  
24       lines of code that are available. And, in addition, you  
25       know, even though -- and as you indicated, as you

1       recognized, there were multiple experts. Some of the code  
2       they had to print may have overlapped with some other  
3       expert's code, so there were some increasing numbers as a  
4       result of that as well because each expert had their own  
5       view obviously as to what they considered reasonably  
6       necessary.

7                   THE COURT: But my understanding is there has  
8       been a lot of code printed for these 14 patents, ten of  
9       which are going to go to trial, and the experts totally have  
10       only identified something under 900 pages of these -- 900  
11       printed pages.

12                  So what happened to -- so when I subtract 888  
13       from roughly 7,000, and I recognize that may not be a lot of  
14       source code in -- by measurement in the sense of lines and  
15       millions and millions and millions of parts of source code  
16       that Apple has, I'm trying to figure out where the other  
17       6,000 pages are and what they're being held on for.

18                  MR. DANIELS: I guess there are sort of two  
19       questions in there. To answer your first one, I can only  
20       say that this is a process that the experts engaged in when  
21       they prepared their infringement reports. Obviously, they  
22       whittled things down to what they considered they needed  
23       ultimately in their expert reports.

24                  There was -- you know, there's obviously a  
25       process that they go through in terms of identifying code

1 and then preparing the reports. So I don't know  
2 specifically how those ended up, you know, going from 7,000  
3 to a little under a thousand or something, whatever that  
4 number is, but I'm sure that that is -- that's how it  
5 happened.

6 The reason for retaining the code is that there  
7 are several open issues still left in this case, and, you  
8 know, we just returned from a Markman hearing. There are  
9 many terms, you know, claim issues -- many claim terms that  
10 are still at issue. There are summary judgment motions that  
11 are still at issue. And there was code that was printed  
12 because, certainly because claim construction had not been  
13 resolved at that point.

14 So there is some wiggle room that was allowed in  
15 terms of what the outcomes would be, and so that's one of  
16 the reasons why there's probably more code out there that is  
17 presently being used because things might adjust. And there  
18 was even discussion about potentially additional expert  
19 reports coming in. So I'm not saying that's going to happen  
20 necessarily, but there certainly was discussion before Judge  
21 Robinson about that.

22 THE COURT: So who has copies of the source code  
23 now? Does counsel for MMI have copies of the source code  
24 that the experts have and are using, both have and are  
25 using?

1 MR. DANIELS: Yes, your Honor.

2 THE COURT: And did the experts still have  
3 copies of the source code that they used?

4 MR. DANIELS: I believe -- I believe -- yes, I  
5 believe with Dr. Meldal, that's the case, and I have to  
6 confirm with the other -- with the other two.

7 THE COURT: Do they have copies of the source  
8 code that they requested but did not use in their reports or  
9 deposition?

10 MR. DANIELS: I believe they still do. Yes,  
11 your Honor.

12 THE COURT: Do you have them divided up as to  
13 who has what? That is, which expert looked at what parts of  
14 the source code? I'm talking about experts that are being  
15 used for trial, not Mr. Finch.

16 MR. DANIELS: Yes, your Honor. We know which  
17 code was reviewed by each of the experts.

18 THE COURT: So there's really no reason for the  
19 experts to hold onto any code because you've got the code  
20 now, and if you were allowed to retain that, you could  
21 provide the code to the experts, your individual experts,  
22 when they could potentially need to review for trial  
23 purposes, for example.

24 MR. DANIELS: Yes, your Honor. We would have no  
25 problem, you know, having the experts send us, consistent

1 with the protective order. And what I mean by consistent, I  
2 say, you know, the witnesses are to, having them send to us  
3 the code that they still have and then we can retain it  
4 until, you know, it's needed.

5 THE COURT: And how are you maintaining the  
6 safety of this code?

7 MR. DANIELS: We have it under lock. Obviously,  
8 it's only in hard copy.

9 THE COURT: Sure.

10 MR. DANIELS: It's in counsel's office in a  
11 locked file cabinet.

12 THE COURT: And divided up according to expert  
13 A, expert B and expert C, something along those lines?

14 MR. DANIELS: That's exactly right, your Honor.

15 THE COURT: And it's divided up according to  
16 the source code that each expert requested for their own  
17 review?

18 MR. DANIELS: I am almost certain of that. I  
19 don't know that for a fact, but I'm almost certain that that  
20 is correct, your Honor. I know that it's all retained in  
21 one place and that it's organized by report and by -- yes,  
22 by report. And there's also source code that Apple used as  
23 well in its reports, which we have hard copies of as well.  
24 Apple obviously knows it. Those are being protected in the  
25 same way.

4 (Discussion held off the record.)

5 || THE COURT: On the record.

6 I didn't look at this as a no harm, no fall  
7 situation. Whether it was not well defined what was  
8 expected of the parties, particularly the language that the  
9 receiving party shall not print source code, to review  
10 blocks of source code elsewhere in the first instance.

11 Frankly, that's exactly what I think Dr. Williams did when  
12 he relied upon Mr. Finch to provide him with that. In other  
13 words, he may have given Mr. Finch some instructions. The  
14 high levelness of them versus how detailed they were I'm not  
15 going to go into, but that would have required Mr. Finch,  
16 who is having some computer technology and programming in  
17 his own right as pointed out to me by MMI, review it, get  
18 the information, and send them to him.

19 So it wasn't actually Dr. Williams going through  
20 the source code in the first instance and then he was  
21 actually having somebody else do it for him and then  
22 reviewing it elsewhere.

23 So in the literal sense, if I look at that  
24 language, that language was violated. But I'm also  
25 recognizing with some hope that the whole purpose of this

1 approach -- and the Court recognizes the value of source  
2 code and the importance of it for an entity such as Apple --  
3 that the intent was just to limit how many fingers got into  
4 this pie. That is, how many people actually had access to  
5 the source code that Apple didn't necessarily know about or  
6 would understand who was getting what. And that's what I  
7 think was important to them, and I can understand why. I  
8 mean, quite frankly, source code for Apple is the end all,  
9 be all. It's the crown jewel in many respects. It's how it  
10 survives based upon what its company is based on. So that  
11 is a concern that I do have.

12 Now, what is being requested by Apple in the  
13 first right, that I had some concerns about how extensive  
14 it is. I do agree with how Luann finally defined to me  
15 what she was looking for from Dr. Williams might be an  
16 approach.

17 But I would like your comment on that, Rodger.  
18 That is, the last part that I discussed with her, about what  
19 they were actually asking for about what Dr. Williams should  
20 be precluded from doing.

21 MR. SMITH: Your Honor, I think the problem with  
22 that is that we're bringing now into the substantive issues  
23 for Judge Robinson to deal with in terms of what it was  
24 proper for Dr. Williams to rely on.

25 THE COURT: Yes. I think it's more a motion in

1 limine.

2 MR. SMITH: Yes. I mean, he provided his expert  
3 report. He gave a deposition. It sounds to me like they're  
4 asking Judge Robinson for relief as to what he can testify  
5 to based on how MobileMedia chose to structure its experts  
6 and conduct its expert review here.

7 THE COURT: Well, no, no. What she's basically  
8 saying is, listen, we didn't know -- Dr. Williams said he  
9 didn't rely upon Mr. Finch for anything, basically, except  
10 give me the source code, get copies for me for me to review.  
11 That's basically how it was presented in his deposition. At  
12 least that's what's being related to me. And he didn't  
13 identify them as a source of information -- excuse the pun  
14 for the use of the word "source" -- of information.

15 What I think she's saying, and what I understand  
16 she's saying is that if he turned to Finch and got  
17 information about how Apple structured the source code was,  
18 or sought him as a factual source or an expert source in  
19 that regard, but was never identified, that could be  
20 problematic.

21 MR. SMITH: Your Honor, I agree, and it would  
22 be problematic even if we didn't have this source code  
23 dispute.

24 THE COURT: Yes, that's true. That's true.

25 MR. SMITH: I think that sort of discussion

1 later on as to what he's permitted to testify at trial  
2 about, they're trying to move forward into some source code  
3 dispute, a substantive matter that -- I don't think it's  
4 ripe for consideration now.

5 I understand that if they recognize now how  
6 draconian their letter sounded, and to my eyes it was a  
7 little unclear as to what they were asking for. I thought  
8 they were looking for preclusion as to any source code that  
9 Mr. Williams saw as a result of Mr. Finch's review.

10 THE COURT: Well, that may be what they thought  
11 in the first instance and decided to back off. That's okay.  
12 You know, when you write a letter, sometimes you're a little  
13 ticked off.

14 Go ahead.

15 MR. SMITH: Fair enough, your Honor.

16 You know, we beg to differ as to how the -- you  
17 know, what the first instance provision says. We understood  
18 it to mean the receiving party. We had -- Mr. Finch spent  
19 hours and hours and hours there, and Mr. Williams, as he  
20 testified in his deposition, spent three or four days there  
21 himself.

22 And --

23 THE COURT: But Mr. Finch wasn't going to be the  
24 one who is going to be preparing an expert report. I think  
25 that's what Apple's gripe was. He's a consultant that you

1       hired not for trial, not to testify. You hired Dr. Williams  
2       as well as Dr. Meldal, as well as any somebody else, who was  
3       actually going to be testifying. And I understand their  
4       concern in that regard, because it's for what -- and the  
5       reliance, frankly, on counsel's representation that they  
6       felt it was a reasonable amount being limited for a  
7       reasonable purpose.

8                    MR. SMITH: Right, your Honor. It would be a  
9       little bit different, though, if it was only counsel -- say  
10       Mr. Federbush went in and reviewed the source code and just  
11       printed out large chunks for the experts to look at later,  
12       but that's not what happened here. We had somebody who  
13       understood source code more than I did or I think probably  
14       more than Mr. Federbush did go in, look at the source code.  
15       He had some conversations with Mr. Williams to gain guidance  
16       as to what was needed to be produced, printed. And we think  
17       it meets the letter of the provision. I think it's a little  
18       bit of Apple trying to have the provision read differently.  
19       I mean, they would have to rewrite the provision and say the  
20       testifying expert will not print and may not review later in  
21       the first instance. And that's not what it says.

22                   And so we read the provision. We had a, you  
23       know, reasons for having Mr. Finch do the review instead of  
24       Dr. Williams, and it's a little late, we think, to have them  
25       come back now and say -- well, it's almost a gotcha to come

1 back and say, well, you shouldn't have done it that way.  
2 And they knew Mr. Finch was the one reviewing it. There was  
3 no surprise about him. They knew he was disclosed under the  
4 protective order. And so now to sort of get substantive  
5 relief as to what Dr. Williams can testify about, it just  
6 does not feel like it flows from what they view as the  
7 violation and we don't see as the violation and didn't at  
8 the time when we structured our expert review.

9 THE COURT: All right. Is there anything else  
10 that you wish to add?

11 MR. SMITH: I don't, your Honor. Thank you.

12 THE COURT: My solution is to sit back and  
13 say -- before I do that, Luann, did you want make any  
14 comments concerning the last argument that was made by  
15 Mr. Smith, by Rodger, regarding whether we're going into the  
16 domain of Judge Robinson's determination as to what is  
17 appropriate for trial?

18 MS. SIMMONS: I don't think I had anything  
19 further to add other than we really did try to tie the  
20 relief that we're seeking back to what we see is the  
21 violation of the protective order. And, frankly, even if it  
22 is draconian, we do still think that we could -- could have  
23 asked for a complete preclusion, but we were trying to be, I  
24 don't know, a little bit more reasonable about it. So we  
25 did try to tie this all back to the violations of the

1 protective order.

2 THE COURT: Well, first of all, the first  
3 request was that the court order MMI to return all source  
4 code that it printed and copies thereof. That was not  
5 specifically cited in the expert reports.

6 What I'm going to require to do is that the  
7 experts provide -- destroy or provide their copies to MMI's  
8 counsel, who keeps it under lock and key. Since there are  
9 matters that are still outstanding in this case, including  
10 the trial, I'm not going to require that all the source  
11 code that had been printed necessarily gets returned, but  
12 I do require that it now gets out of the hands of the  
13 experts and are kept in counsel's hands and kept under lock  
14 and key.

15 I recognize that review for -- of the source  
16 code and going through portions of it again, including those  
17 portions that Apple may have cross-examined the experts on,  
18 or depending upon what the claim construction is, could have  
19 an effect on what happens in the future of this case, and  
20 I'm not certain what Judge Robinson is necessarily going to  
21 allow or what the parties are going to request. But I think  
22 having it kept in a defined group of hands, that I would  
23 expect counsel to be fully responsible for, especially if  
24 any leaks do occur, and put the onus on counsel rather than  
25 on the experts.

1                   Secondly, on the request regarding Dr. Williams,  
2 even the modified request that's being made, I do think it  
3 is an issue more on a motion in limine situation and should  
4 be addressed by Judge Robinson at the time either when she  
5 addresses such motions or when she addresses such argument,  
6 because if it turns out -- to me, there's a source code,  
7 potential source code violation here.

8                   The receiving party wasn't provided to me as a  
9 definition, but I could understand how -- more so how Apple  
10 was viewing the receiving party as the person who is  
11 actually looking at it in the first instance from the  
12 computers that are made available to get the source code  
13 from, but there wasn't necessarily going to be somebody else  
14 in there, such as either counsel or some other person in  
15 there pulling the source code off for the expert to review  
16 at someplace else.

17                   It's this type of domino effect that is having  
18 more hands in the pot for certain portions of the source  
19 code and the distribution process that I think causes Apple  
20 some angina, understandably so, because of the value that  
21 they place on their source code and that I recognize.

22                   To sit there and say I think it's a willful or  
23 intentional violation, I can't get to that stage. And so  
24 the Williams issue that was brought up today I think more  
25 appropriately should be addressed with Judge Robinson.

1       However, in my view, what's being requested, particularly in  
2 light of the fact, and Judge Robinson may disagree with me  
3 on this, but particularly in light of the fact that there's  
4 no indication from Dr. Williams that he used Mr. Finch as  
5 a -- he used him as a means to -- for Mr. Finch to transmit  
6 information to him, not used him as a means of a source of  
7 information, either as an expert or a factual source, or  
8 some type of analysis. That has not been disclosed.

9               If it turns out that he did use Mr. Finch in  
10 that regard, then I think that is a different problem for  
11 MMI better addressed, though, by Judge Robinson, should  
12 information or should this become apparent. But if I were  
13 in Judge Robinson's shoes and this did become apparent or  
14 such, I would have some serious concerns about Dr. Williams  
15 being able to rely upon such information, that type of  
16 information from Mr. Finch when he wasn't identified as a  
17 source.

18               Thirdly, the issue was the monetary sanction  
19 and Apple's legal fees in bringing this motion. Before I  
20 decide that issue, what are we talking about? Do we have  
21 any idea?

22               MS. SIMMONS: I'm sorry, your Honor. I actually  
23 don't, but I can provide that in short order.

24               THE COURT: You can provide it in short order,  
25 some basic argument based upon what my conclusion was here

1 today as to why you think you're still entitled to it. I  
2 will give you the right to provide an affidavit along with a  
3 two-page letter, two to three-page letter or so in single  
4 spaces the arguments, like the arguments that you made here  
5 today. I will then also, within a week after that, submit  
6 it. I will then also allow MMI to respond in kind. By a  
7 week, I'm talking about five working days. And I will  
8 decide whether or not in my mind it's warranted, and counsel  
9 can advise, based upon my findings here today, why they feel  
10 it's warranted and why you feel it isn't warranted.

11 MS. SIMMONS: Thank you, your Honor.

12 THE COURT: All right. How long do you think  
13 it's going to take you to do this, Luann?

14 MS. SIMMONS: I should be able to provide that  
15 within a day.

16 THE COURT: Within a day, including --

17 MS. SIMMONS: I believe that's right, although  
18 my accounting people might be angry with me, so maybe I will  
19 say two days.

20 THE COURT: No. I'm not trying to hold you to a  
21 horribly shortened time frame, but I also want to make sure  
22 that you are giving yourself enough time to make your  
23 arguments as to why you're entitled to fees and costs  
24 based upon my findings today, too. So you might want to  
25 wait --

1 MS. SIMMONS: Why don't we say Monday, the 6th.

2 Is that acceptable to your Honor?

3 THE COURT: That's fine to me, but did you want  
4 to wait until the transcript is done?

5 MS. SIMMONS: You guys seem to be very fast with  
6 your transcripts.

7 THE COURT: Val said she can get it done today.

8 Why don't we make it a week from when the transcript is  
9 issued. And then, Rodger, and your side, and Justin, your  
10 side will have a week after their submissions.

11 Remember, counsel, that anything that you submit  
12 under seal I can't run off, I can't get off the website. We  
13 don't have that capability, so make sure you provide -- I  
14 just need a courtesy copy. That's fine for chambers.

15 MS. SIMMONS: Okay.

16 THE COURT: Okay. Maximum two to three pages of  
17 that type of argument. I can't imagine it's going to take  
18 that long, but you'll have it.

19 All right. Thank you.

20 MS. SIMMONS: Thank you, your Honor.

21 MR. DANIELS: Thank you, your Honor.

22 THE COURT: Take care. Bye-bye now.

23 (Telephone conference concluded at 10:38 a.m.)

24 - - -  
25